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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 116

MAX W. WINN AND SAMUEL BLOOM,
Appellants,

against

THE PITTSTON COMPANY,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
I. Factual Statement	1
II. The Issue Involved	3
III. Decision of the Court Below	3
IV. No substantial Federal Question Is Presented by the Attempted Appeal	5
V. Conclusion	8

Table of Cases Cited

Adams v. *U. S. Distributing Corp.*, 186 Va. 325, 34 S. E. (2d) 244 cert. den. 327 U. S. 788	2, 6
American General Corp. v. *Camp*, 171 Md. 629, 190 A. 225	4
Beachwood Securities Corp. Inc. v. *Associated Oil Co., et als.*, 104 F. 2d 537	6, 8
Churchill v. *Frontier Mortgage Corp.*, 219 App. Div. 643	8
Dohany v. *Rogers*, 281 U. S. 362, 50 Sup. Ct. 299	5
Matter of Erlanger, 237 N. Y. 159, 142 N. E. 571	4, 5
Jacobs v. *United States*, 290 U. S. 13, 54 Sup. Ct. 26	5
In re Janssen Dairy Corp., 2 N. J. Super. 580, 64 A. (2d) 652	4
Mayfield v. *Alton Ry., Gas & Electric Co.*, 198 Ill. 526, 65 N. E. 100	6, 8
Meade v. *Pacific Gamble Robinson Co.*, 51 A. (2d) 313, aff'd. 58 A. (2d) 415	4, 5
Missouri Pacific Ry. v. *Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130	7
O'Hara v. *Pittston Co.*, 186 Va. 325, 42 S. E. (2d) 269	2
Id., 63 S. E. (2d) 34	2
Pearson v. *Clam Falls Cooperative Dairy Association*, 243 Wis. 369, 10 N. W. (2d) 132	6, 8

Page

Phelps v. *United States*, 274 U. S. 341, 47 Sup. Ct. 611 5

Root v. *York Corporation* (D. Del. 1944), 56 F. Supp. 298 8

Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299, 43 Sup. Ct. 354 5

United States v. *North American Transp. & Trading Co.*, 253 U. S. 330, 40 Sup. Ct. 518 5

CONSTITUTIONAL PROVISIONS CITED

Constitution of United States, Fourteenth Amendment 3

Constitution of Virginia, Article III, Section 88 2

STATUTES CITED

Code of Virginia, § 3822-a 1, 2, 3, 5, 7

Code of Virginia, § 8-494 2

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No. 116

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STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND APPELLEE'S MOTION TO DISMISS OR AFFIRM.

The Pittston Company, Appellee in the above entitled cause, for its statement in opposition to appellants' statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm respectfully shows the following:

1. Factual Statement

On January 1, 1943, The Pittston Company merged with United States Distributing Corporation, a Virginia corporation, pursuant to the merger laws of that State. Appellants constitute a group of dissenting stockholders of the latter corporation, who duly noticed their objection to the proposed merger and thereupon, under § 3822-a of the

Virginia Code,[1] became entitled to an appraisal of the "fair cash value" of their holdings "as of the day before the vote for the agreement of consolidation or merger" (§ 3822-a [a]). After appellants unsuccessfully had attempted to proceed in equity rather than under the merger statute (see *Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 34 S.E. [2d] 244, cert. den. 327 U.S. 788) and they refused to abide by the $55 per share awarded by the appraiser in 1944 to the other dissenters in the blanket appraisal proceeding in which appellants would not participate (*O'Hara* v. *Pittston Company*, 186 Va. 325, 42 S.E. [2d] 269), new appraisal proceedings were held in 1949, resulting in the determination of $57.75 per share as the fair cash value of appellants' holdings. The Chancery Court, over our opposition, allowed interest from the date of merger until the date of payment. No opinion was filed by the trial judge.

Upon appeal to the Virginia Supreme Court of Appeals, the Chancery Court judgment was reversed by a 3 to 2 decision (two justices not sitting), and remanded for the entry of a judgment modifying the decree by striking therefrom the provision for interest (*O'Hara* v. *Pittston Company*, 63 S.E. [2d] 34).

In a subsequent petition for rehearing, appellants, pointing to the Fourteenth Amendment of the Federal Constitution, sought to invoke § 88 of the Virginia Constitution,[2] as implemented by the Code (§ 8-494), which requires

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[1] In the Virginia Code of 1950, § 3822-a has been recodified as paragraphs 47 through 64 of Title 13 without any change pertinent to the issue herein involved. As § 3822-a has been used throughout this litigation that designation will continue for the purposes of this statement. The Section is printed in full as Appendix A to appellants' jurisdictional statement.

[2] Insofar as pertinent, this section reads: ". . . no case involving a construction of the Constitution of this State or of the United States, shall be decided except by the Court in bank and the assent of at least

the concurrence of four members of the Court in a constitutional decision. The Court refused to reconsider its 3 to 2 decision in this case.

II. The Issue Involved

The sole question is whether the Virginia merger statute, as construed by the highest court of that State to exclude the allowance of interest for any period prior to judgment, effectuates a taking of private property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

III. Decision of the Court Below

The opinion of the Court below (per Eggleston, J.), after detailing the pertinent facts and tracing the course of the litigation up to that time, summarizes the provisions of § 3822-a and concludes:

> "From this analysis it is plain that the statute makes no provision for the allowance of interest to the dissenting stockholder on the ascertained fair cash value of his stock either by the appraisers or by the court in its entry of judgment. Whether the court adopts the valuation of the appraisers, or itself fixes such valuation, it is authorized to enter judgment only for the ascertained fair cash value as of the specified time." [63 S.E. (2d) at p. 39]

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four of the judges shall be required for the Court to determine that any law is or is not repugnant to the Constitution of this State or of the United States; and if, in a case involving the constitutionality of any such law, not more than three of the judges sitting agree in opinion on the constitutional questions involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full Court; and in no case where the jurisdiction of the Court depends solely upon the fact that the constitutionality of a law is involved, shall the Court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. . . ."

The Court noted that, with two possible exceptions distinguished in the opinion, the courts of other states in construing similar statutes had achieved, in all cases by unanimous decisions, the identical result. (See *Meade* v. *Pacific Gamble Robinson Co., Del.*, 58 A. [2d] 415, aff'g., 51 A. [2d] 313; In re *Janssen Dairy Corp.*, 2 N. J. Super. 580, 64 A. [2d] 652; *American General Corp.* v. *Camp*, 171 Md. 629, 190 A. 225; *Matter of Erlanger*, 237 N. Y. 159, 142 N. E. 571.)

The Court found these decisions grounded upon four general principles, three of which involved considerations of state law. The fourth disposed of the contention herein raised:

> "The merger of a corporation in which the dissenting stockholder owns stock with another does not constitute a 'taking' of the stock of the Dissenter in the sense of a condemnation proceeding. In a merger there is no taking of the dissenter's stock without his consent. Under the terms of the statute, which is a part of his contract, he has the election to retain his stock in the consolidated corporation or to accept the fair cash value thereof. There is no compulsion on him to choose one course rather than the other. If he elects not to remain with the merged corporation, he surrenders his stock in return for the fair cash value thereof pursuant to the terms of his contract with the corporation. Meade v. Pacific Gamble Robinson Co., supra, 51 A. 2d at pages 317, 318: In re Erlanger, supra, 142 N. E. at page 573." (63 S. E. [2d] at p. 40.)

In their petition for rehearing addressed to the Virginia Supreme Court of Appeals, appellants put squarely the constitutional point now raised. By denying rehearing the Virginia court held, in effect, that no real constitutional question was involved for if, in their view, such a question were presented, then the Virginia Constitution would have

compelled a rehearing before the full court. (Virginia Constitution, § 88 quoted at note 2.)

IV. No Substantial Federal Question Is Presented by the Attempted Appeal

Appellants would found this Court's jurisdiction solely upon an asserted analogy to condemnation cases wherein condemnors, in accord with accepted constitutional doctrine respecting the fixing of "just compensation" for a "taking" of private property by "state action," are required to grant the condemnee the value of his property at the time of taking, *plus* the value of the use of the property to the date of payment. As a matter of both equity and convenience, interest at a pertinent prevailing legal rate has frequently been adopted and approved as the fair measure of this second item, i. e., the use of the property after appropriation. (See *Jacobs* v. *United States*, 290 U.S. 13, 54 Sup. Ct. 26; *Dohany* v. *Rogers*, 281 U.S. 362, 50 Sup. Ct. 299; *Phelps* v. *United States*, 274 U.S. 341, 47 Sup. Ct. 611; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299, 43 Sup. Ct. 354; cf. *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 40 Sup. Ct. 518). Thus the judicial definition of "just compensation" expressly combines two separate elements.

In contending that "fair cash value" as used in § 3822-a can only mean "just compensation," in its constitutional sense appellants build their argument upon the theory that a merger works a "taking" of private property in a manner equivalent to condemnation. But a corporate merger under a merger statute does not involve any "taking" of the property of dissenting stockholders (see *Meade* v. *Pacific Gamble Robinson Co.*, 51 A. (2d) 313, 318, aff'd 58 A. (2d) 415; *Matter of Erlanger, supra*, 237 N.Y. at 166.)

By way of simple illustration, if corporation A is merged into corporation B, A's stockholders are offered B stock which represents a continuing interest in the merged assets of A and B. The interests of A's shareholders in the assets of A are not taken from them; their interest in them is continued, and in addition A's stockholders acquire an interest in the assets of B. One can hardly say, under these circumstances, that there is a "taking" from shareholders in the case of a merger.

Although there is no taking, the statute gives the shareholders of a constituent corporation the right to require the merged corporation to pay them the fair value of their shares by following the prescribed procedure. The election, then, in the case of the merger of corporations, is one which the shareholder himself is entitled to make. He can elect to continue his interest in the assets of his corporation via stock ownership in the merged corporation, or he may in effect force the corporation to purchase his shares at their fair value.

Thus, the shareholder is in a completely different position from that of an owner of land whose property is actually taken from him against his will and who has no alternative but to accept payment therefor.

Furthermore, the Virginia merger statute including its appraisal provisions, has been specifically held in an earlier case between these same parties, to be an incident of the contract between stockholders and their corporation. (*Adams* v. *U. S. Distributing Corporation, supra,* [illegible] S.E. [2d] at 251;[3] cert. den. 327 U.S. 788.) Thus § 3822-a merely prescribes for all stockholder contracts a uniform clause

[3] The same result has been reached under other state statutes. See *Meade* v. *Pacific Gamble Robinson Co., supra; Pearson* v. *Clam Falls Cooperative Dairy Association,* 243 Wis. 369, 10 N. W. (2d) 132; *Mayfield* v. *Alton Ry. Gas & Electric Co.,* 198 Ill. 528, 65 N. E. 100, 102; *Beechwood Securities Corp. Inc.* v. *Associated Oil Company, et als.,* 104 F. 2d 537.

declaring in advance the rights of the parties where a merger is contemplated. A dissenting stockholder is privileged thereunder either to abide by the terms of the merger proposed, accept stock in the merged corporation and share in its subsequent fortunes or to release his interest in return for the fair cash value of his holdings. Here appellants, having elected to take the "fair cash value" of their shares at the time of the merger, have received exactly what, under § 3822-a (as a part of the contract they entered into in becoming stockholders) they voluntarily agreed to take in such a case.

Appellants' contention may readily be reduced to an absurdity. If a merger involved a taking of a dissenter's property in the same way as a condemnation proceeding involves a taking of property, then *all* merger statutes would be invalid on the ground that they work a taking of dissenters' property for *private* use without their consent.

Missouri Pacific Railway v. *Nebraska*, 164 U.S. 403, 17 Sup. Ct. 354, cited by appellants, illustrates this point. That case arose when a railroad refused to grant a portion of its right of way—i.e., land privately owned for public purposes—to a group of private individuals for the construction of a grain elevator on the same terms and conditions on which two other private groups had obtained like facilities. Subsequently, a state agency ordered the railroad to grant the location and the State Supreme Court upheld this order. The matter of just compensation for the alleged taking formed no part of the court's consideration of the case, as, in reversing, it was held as follows:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building

> and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." (p. 417)

We must conclude therefore—as did the Court below and other state courts which have considered the question—that a merger statute in no way effects a taking of private property under state authority. (*Beechwood Securities Corp., Inc.* v. *Associated Oil Co., et als.*, 104 F. 2d 537.)

Indeed, it has been held that a merger statute need not provide any payment whatsoever for dissenting shares. (See *Pearson* v. *Clam Falls Cooperative Dairy Association*, 243 Wisc. 369, 10 N.W. [2d] 132; *Mayfield* v. *Alton Ry., Gas and Electric Co.*, 198 Ill. 528, 65 N.E. 100, 102; *Churchill* v. *Frontier Mortgage Corp.*, 219 App. Div. [N.Y.] 643; *Root* v. *York Corporation* [D. Del. 1944] 56 F. Supp. 288, 292. See also 15 Fletcher on Corporations [Perm. Ed.] § 7164.) *A fortiori*, a merger statute need not provide for interest.

V. Conclusion

It is submitted that the Supreme Court of Appeals of Virginia, in construing that state's merger statutes so as to deny interest to appellants on the fair cash value of their holdings has in no way offended the due process clause of the Fourteenth Amendment of the United States Constitution and that, therefore, this appeal presents no substantial Federal question which entitles appellants to invoke the jurisdiction of this Court.

WHEREFORE, The Pittston Company, as appellee herein, respectfully moves that the within appeal be dismissed or,

alternatively, that the judgment and decision of the Supreme Court of Appeals of the State of Virginia be affirmed.

Respectfully submitted,

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